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In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 196) is reported in 33 F. (2d) 582.

The report of the Interstate Commerce Commission (R. 117) appears as *Chicago, Milwaukee & St. Paul Reorganization,* 131 I. C. C. 673.

JURISDICTION

The decree of the District Court was entered July 15, 1929. (R. 204.) Petition for appeal was filed August 21, 1929, and was allowed on the same day. (R. 206, 208.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C. Sup. III, Title 28, Sec. 47a), and Subsection 4, Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

Appellee purchased, subject to proper approval of the issue of its securities, assets of a railroad sold in foreclosure proceedings pursuant to a Plan of Reorganization promulgated by two banking houses (hereinafter sometimes called "the Managers"). The Plan required stockholders of the railroad desiring to participate in the reorganization to make a cash payment which, except to the extent of $4 per share, was to be capitalized in bonds of the new company (subsequently appellee). The Plan permitted the Managers to retain $1.50 per share of this payment (hereinafter sometimes called "the $1.50 fund") and pay out of this fund their own fees and the fees of certain Committees of security holders. The Plan provided that the Managers should pay any balance remaining to appellee or return it *pro rata* to the depositing stockholders, if the Managers should so determine.

The Interstate Commerce Commission approved the issue of appellee's securities on the express condition that appellee impound the money received from the $4 a share assessment to be paid by stock-

holders and disburse the same only when so authorized by the Commission or the court. Appellee, after issuing the securities so authorized, brought a petition in equity, which *inter alia* prayed for the annulment of any part of the order of the Commission which should be held to compel appellee (1) to obtain possession of the $1.50 fund and (2) to submit to the Commission any matters relating to payments from it.

The questions presented are whether the condition of the order of the Commission approving the issue of appellee's securities applied to the $1.50 fund and, if it so applied, whether the condition is void because beyond the scope of the Commission's statutory authority.

The further question presented is whether, even if the condition was beyond the statutory authority of the Commission, appellee may sue to enjoin enforcement thereof after appellee had availed itself of the authority granted in the order to which the condition attached; in other words, whether the court has jurisdiction to strike down a condition to an order of the Commission where the effect would be to substitute its judgment for that of the Commission upon an administrative question.

STATUTE INVOLVED

The pertinent provisions of Section 20a of the Interstate Commerce Act as enacted by the Transportation Act, 1920, c. 91, 41 Stat. 456, 494, 496 (U. S. C., Title 49, Sec. 20a) read as follows:

(2) * * * it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications

and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

* * * * *

(10) The Commission shall require periodical or special reports from each carrier hereafter issuing any securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof.

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; * * *. Any director, officer, attorney or agent of the carrier

who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

The properties of the Chicago, Milwaukee & St. Paul Railway Company (hereinafter sometimes called "the old company") were placed in receivership in the United States District Court for the Northern District of Illinois on March 18, 1925. (R. 118–119.) After certain protective Committees for security holders had been formed, Kuhn, Loeb & Company and the National City Company formulated, as Managers, a Reorganization Plan. This Plan, as subsequently modified, was approved by all but one of the various protective Committees. (R. 123.)

Common and preferred stockholders of the old company who accepted the Plan by depositing their

stock thereunder were required to pay $32 and $28 per share, respectively. For each share of common stock so deposited, the depositor was to receive in exchange one share of common stock and $28 principal amount of 5% bonds of the new company, and for each share of preferred stock so deposited the depositor was to receive in exchange one share of preferred stock and $24 principal amount of 5% bonds of the new company. (R. 50–51, 54.) The assessments on stockholders, on the basis of outstanding stock, aggregated about $70,000,000. Out of this sum the Plan called for the payment of certain specific obligations totalling about $53,500,000. The balance of about $16,500,000 was to provide for additions and betterments; new equipment and other capital expenditures; working capital; settlement of claims; organization, franchise, and other taxes; foreclosure, receivership, and reorganization expenses. (R. 39–40.)

All of this $16,500,000 was not made available to the new company. The Plan permitted the Managers to retain $1.50 a share, amounting to about $3,500,000 (R. 140), and to pay out of this $1.50 fund their own fees, which were fixed at about $1,044,000 (R. 140–141), and the fees of the various Committees and the fees and disbursement of their counsel, depositaries, and subdepositaries. (R. 39–40.) The Managers could in their unrestricted discretion fix the compensation of the Committees, the depositaries and subdepositaries, and of all

others, except themselves and underwriting syndicates, entitled to compensation in the reorganization. (R. 56.) The Managers were to be the sole judges of the propriety or expediency of the expenses and liabilities, including counsel fees, of all Committees representing security holders, and all accounts of Committees when approved by the Managers were to be binding and conclusive upon all parties interested therein. (R. 88.)

In November, 1926, the properties of the old company were sold under final decree of foreclosure to Robert T. Swaine and Donald C. Swatland (hereinafter sometimes called "the Purchasers") acting as agents for the Managers, who in turn were acting for the depositing security holders. In January, 1927, the District Court confirmed the sale and held the Plan valid. The decree was affirmed on appeal by the Circuit Court of Appeals for the Seventh Circuit (*Jameson* v. *Guaranty Trust Co.*, 20 F. (2d) 808), and a writ of certiorari was denied by this Court on November 28, 1927. (275 U. S. 569.) The decree confirming the sale provided that the deeds therein authorized should not be delivered to the new company until it should have been authorized by the Commission to issue the securities provided in the Plan, and the purchasers were not required to take any part of the properties sold until after the issue of these securities. (R. 7–8.)

Appellee was organized on March 31, 1927. On April 11, 1927, it entered into an agreement with

the old company, the Purchasers and Managers.[1] (R. 8.) Appellee agreed to pay and discharge the purchase price for the property of the old company and to indemnify the Purchasers against any liability whatsoever incurred by them by reason of their bid for this property. (R. 95–96.) Appellee also agreed to reimburse the Managers for any payments made by them at any time under the Plan in carrying out the reorganization (other than items chargeable against the $1.50 fund) and to indemnify them against all liabilities and charges whatsoever (other than those covered by the $1.50 fund) in carrying out the Plan. (R. 99.) Appellee agreed to issue to the Managers the securities provided in the Plan. (R. 97–98.) The Managers agreed to transfer and assign to appellee all bonds of and claims against the old company deposited with them under the Plan (R. 96), or to apply these bonds and claims to the payment of the purchase price of the property under the decree of foreclosure (R. 97), and agreed to pay over to appellee all cash received by them under the Plan (other than the $1.50 fund) and remaining after the Managers had paid all reorganization expenses permitted or contemplated by the Plan. (R. 98.) The agreement was subject to the approval of the issue of appellee's

[1]A Delaware company to whom the Purchasers had previously assigned all their interest in the properties purchased was also a party to this agreement. (R. 94.) This company joined in the assignment made by the Purchasers to appellee. (R. 95.)

securities by the appropriate public authority. (R. 100.)

On April 12, 1927, appellee applied to the Commission requesting it to approve the issue of the securities provided in the Plan, as well as to grant appellee certain other authority necessary for carrying out the Plan. (R. 111–112, 118.) The Commission on January 4, 1928, issued its report and order. (R. 117, 163.) The report found that the Plan was defective when regarded in the abstract and in the light of a possible ideal of sound financial theory. (R. 137.) It stated that the Commission had permitted to become effective a number of reorganizations involving capital structures which, like the one under consideration, left something to be desired from the point of view of fully sound financial standards, and that this had been done solely upon the ground that the major public interest seemed to require that the properties concerned should be released from receivership at the earliest possible moment. (R. 141.) It mentioned the stockholders' assessment which, to the extent of $4 a share, was not to be capitalized in new "securities." (R. 125.) It stated that the evidence submitted of total reorganization expenses consisted of estimates over eighteen months old and that this evidence was insufficient to enable the Commission to arrive at an opinion as to their reasonableness and the public interest affected thereby. (R. 141.) The report continued (R. 141):

> Jurisdiction of this proceeding will be reserved for the purpose of taking further testimony as to the expenses of the reorganization, the nature and scope of the services performed for the compensation and fees claimed, and any other matters appropriate in the premises, and for the entering of pertinent orders in connection therewith. The authority herein granted to the applicant to issue its securities in accordance with the Plan will be upon the express condition that the applicant shall impound in a separate fund the money received from the payment of $4 a share by the holders of preferred and common stock and shall not pay from such fund any amounts unless and until authorized by due order of court or by this commission.

The Commission's order made the report a part thereof (R. 163) and made its approval of the issue of appellee's securities subject to the following (R. 164):

> Provided, however, and the authority herein is granted upon the express conditions, that the applicant (a) shall not pay any underwriting fees in connection with the proposed issue of securities; and (b) shall impound in a separate fund the money received from the payment by holders of preferred and common stock in an amount equal to $4 a share, which shall not be paid out unless and until so authorized by order of the court in respect to payments subject to the court's jurisdiction or by this commission.

On January 12, 1928, appellee issued to the Managers the securities so authorized and they in turn distributed these securities to the depositing stockholders and bondholders of the old company. The Managers applied deposited bonds of the old company to payment of the purchase price for the latter's property and paid appellee, or applied or held for its account, the cash assessment on the stockholders, less $1.50 a share. (R. 9–10, 185.)

Appellee on January 27, 1928 (R. 169), filed with the Commission a supplemental application requesting authority to devote the cash received from the Managers to payment of certain actual and estimated reorganization expenses, and to other corporate purposes. (R. 167.) This application alleged that the assessments on stockholders had been called for payment on or before February 16, 1928, with an option to the stockholders to defer payment of one-half of the assessment until June 1, 1928. (R. 165–166.)

The Commission on March 13, 1928, issued a supplemental order (R. 170) which authorized appellee—

> * * * from the fund to be furnished by the payment of $4 a share * * * (1) to use for its lawful corporate purposes such sum or sums of money, other than for the expenses of reorganization, as shall not be needed for the reorganization expenses, and (2) to pay from time to time out of said fund (a) out-of-pocket expenses paid or in-

> curred in an aggregate amount not exceeding $725,207.73, with interest on any amounts advanced for those purposes, (b) such additional amounts for estimated expenses of a like character, not exceeding $151,900, and (c) any and all amounts which may be or become payable for taxes or governmental charges in connection with the organization of the applicant, its qualification in the States in which it is engaged in business, and the issue and transfer of its securities and the recordation thereof.

The order further directed appellee to file monthly reports showing the amounts used or expended under the authority of the order and the actual expenditures made or incurred and the purpose thereof in lieu of the estimates given in the supplemental application. (R. 171.)

Pursuant to said order appellee filed with the Commission its reports dated April 11, 1928, May 12, 1928, June 14, 1928, July 14, 1928, August 14, 1928, and September 12, 1928. (R. 11.) Neither these reports nor appellee's application filed January 27, 1928, included any item which under the Plan was payable out of the $1.50 fund. (R. 165, 171, 173, 175, 176, 177, 178.) On or about May 22, 1928, appellee filed with the Commission its second supplemental application requesting authority to pay certain reorganization expenses totaling $180,437.80. (R. 12, 180–181.) The Commission did not, prior to the filing of the present suit, authorize payment of these expenses. (R. 12.)

On October 13, 1928, appellee instituted the present suit by filing a petition in equity in the United States District Court for the Northern District of Illinois under the Urgent Deficiencies Act of October 22, 1913, to enjoin the United States and the Commission from enforcing the Commission's order of January 4, 1928, and its supplemental order of March 13, 1928, with respect to the $1.50 fund and with respect to the requirement that reorganization expenses be submitted to the Commission for its determination. (R. 1, 14–16.) When this suit was brought the Managers had not turned over to appellee any part of the $1.50 fund. (R. 13, 187.) The petition alleged that representatives of the Commission had advised appellee that the Commission would not grant appellee any further authority to pay reorganization expenses until it had obtained from the Managers the entire $1.50 fund. (R. 12.) It further alleged that the Commission and the United States had threatened, if appellee should not immediately procure the $1.50 or if payment of reorganization expenses should be made therefrom without prior approval by the Commission, to institute criminal or civil proceedings against appellee for violation of the Commission's order of January 4, 1928. (R. 14.)

The United States and the Commission each filed a motion to dismiss and an answer. (R. 181, 188.) The answers denied that the Commission had authorized any one to speak for it in respect of the disposition which it would make of any application

to it for authority to pay reorganization expenses. (R. 186–187, 194.) The answers also denied that the defendants had threatened criminal or civil proceedings against appellee as alleged in the petition, but admitted that where, as in the instant case, securities had been issued contrary to the terms and conditions of the authority given by the Commission, it was the duty of the Commission to enforce the terms of its order by requesting appropriate court action. (R. 187, 194.) The answers further alleged that the Commission's order of January 4, 1928, granted appellee authority to issue securities only on the condition that the $4 a share received from payments to be made by depositing stockholders should be impounded by appellee instead of being set aside by the Managers. (R. 187–188, 195.)

The only evidence offered other than the documents attached to the petition was a decree of the District Court entered on January 29, 1927, confirming the sale of the properties of the old company to appellee in the foreclosure proceedings. (This decree does not appear in the present record.)

The District Court held that the Commission's order of January 4, 1928, did not apply to the $1.50 fund and that, if it did so apply, it was invalid; it held that the Commission might require that reorganization expenses payable out of the stockholders' cash assessment other than the $1.50 fund be subjected, before payment, to the scrutiny and

supervision of the Commission or the court; and it denied the motion to dismiss. (R. 196–204.) It entered a final decree in accordance with this opinion. (R. 204.) From this decree only the United States and the Commission appealed.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In setting aside, suspending and annulling, and enjoining enforcement of that part of the proviso to the Commission's order relating to the $1.50 fund (termed the "trust fund" in the opinion and decree of the District Court).

(2) In holding, with respect to the proviso requiring appellee to impound the money received from the payment by stockholders in an amount equal to $4 a share, "that the true intent of the proviso is to require to be impounded only such part of the $4.00 as remained after deducting therefrom the trust fund which was not to be received."

(3) In holding that it was beyond the Commission's authority to attach, as a condition to the authority granted appellee to issue securities, the requirement of the proviso relating to the $1.50 fund.

(4) In overruling and denying defendants' motion that the petition be dismissed for lack of jurisdiction in the court to entertain a petition for the setting aside, separately from the Commission's grant of authority to issue securities, of the proviso prescribing, as "express conditions" to the author-

ity granted, parts of the terms and considerations upon and for which the Commission authorized the securities to be issued.

(5) In not dismissing the petition.

SUMMARY OF ARGUMENT

I. The Commission as a condition to its order authorizing the issue of appellee's securities required appellee to impound "the money received from the payment" of the assessment on stockholders "in an amount to equal $4 a share" and to make payments therefrom only on order of the Commission or the court. This condition applied to the fund of $1.50 a share which was a part of said $4 a share. The Commission's report, which was made a part of its order, showed that it intended to retain jurisdiction over payment of all reorganization expenses, including those payable from the $1.50 fund. The Commission's order did not use the words, "money received," to mean money receivable as of right by appellee under the terms of the Reorganization Plan under which it proposed to issue its securities. This interpretation of the order is inconsistent with the construction placed upon it by the District Court in the instant case. The words, "money received," referred to the money received by the Managers from those stockholders who should pay the assessment provided in the Reorganization Plan.

II. Section 20a of the Interstate Commerce Act empowers the Commission, after investigating the purposes and uses of a proposed issue of railroad securities and their proceeds, to authorize their issue with such modifications and upon such terms and conditions as it may deem "necessary and appropriate in the premises." This section permitted the Commission to approve the issue of appellee's securities upon the condition that appellee impound a part of the assessment on the stockholders and pay reorganization expenses therefrom only on order of the Commission or court. The Commission's order retaining jurisdiction over the payment of such of these expenses as were payable out of the $1.50 fund was justified because the terms upon which appellee was issuing its securities entitled it to receive the balance of this fund if it was not returned to the depositing stockholders.

But even if appellee's contingent interest in the $1.50 fund was not in itself sufficient to support the jurisdiction of the Commission over it, the reorganization expenses payable therefrom constituted a refinancing charge within the Commission's regulatory powers over new security issues. One of the purposes of the Interstate Commerce Act as amended by the Transportation Act, 1920, is to protect railroad credit. Improper or unreasonable financing charges are injurious to railroad credit and the Commission has consistently interpreted

Section 20a as permitting it to regulate financing charges. If the Commission in this case could not supervise expenses payable out of the $1.50 fund, reorganization plans may be formulated so as to withdraw all reorganization expenses from the scrutiny and supervision of the Commission. It is submitted that it was within the Commission's discretion to determine that, in fostering the broad purposes of the Commerce Act as amended in 1920, it was "necessary and appropriate" to guard against the imposition of unfair refinancing charges on the stockholders participating in the reorganization.

III. The jurisdiction of the courts to set aside an order of the Commission "in part" would seem to apply to a severable part of a Commission order, but not to an express condition upon which the Commission issued its order, after the authority granted by the order has been exercised. The grounds for this distinction are those which this Court gave, among others, for holding that the courts have no jurisdiction to review a negative order of the Commission, namely, that jurisdiction to review orders of the Commission extends only to cases where the administrative judgment of the Commission has been obtained. Assuming that the Commission had no statutory authority to supervise payments from the $1.50 fund, we submit that the record does not justify this Court in holding that the Commission, if it had been advised that the considerations which led it to take jurisdiction over the $1.50 fund were beyond its power, would

have determined that the major public interest required it to authorize the issue of securities by appellee.

ARGUMENT

I

THE COMMISSION'S ORDER OF JANUARY 4, 1928, APPLIED TO THE $1.50 FUND

The District Court pointed out that under the Plan appellee was not entitled as of right to any part of the $1.50 fund and that the requirement of the Commission was that appellee impound "the money received" from the stockholders' $4 a share payment. It treated the reference to $4 a share as descriptive of the payment of which the "money received" and to be impounded was only a part, and concluded that the true intent of the Commission's proviso was to require the impounding of only such part of the $4 as remained after deducting therefrom the $1.50 fund which, under the Plan, might not be received by appellee. (R. 199–200.)

We submit that this interpretation of the order is erroneous.

The report of the Commission shows that it intended by its order to exercise jurisdiction over the payment of all reorganization expenses, including those payable out of the $1.50 fund. The report of the Commission referred to the evidence submitted to it of the amount of reorganization expenses, including "expenses to be paid out of the

$1.50 per share," and to the evidence submitted of the services rendered by the several Committees and their counsel. (R. 141.) (The fees of the Committees and their counsel were, under the Plan, payable out of the $1.50 fund. R. 40.) The report then stated that this evidence was not up to date and that the record was insufficient to enable the Commission to arrive at an opinion "as to the reasonableness of the expenses and the public interest affected thereby." (R. 141.) There followed the provisions previously quoted (p. 11, *supra*) reserving jurisdiction for taking further testimony as to "the expenses of the reorganization" and as to the nature and scope of the services performed for the "compensation" and "fees" claimed, and making the grant of authority to issue securities subject to the express condition that appellee should impound the money received from the payment of "$4 a share" by stockholders and should not pay from "such fund" any amounts unless and until authorized by due order of the court or the Commission. (R. 141.) This linking of the $1.50 fund with the statement that the issue of appellee's securities was conditioned on its impounding the money received from the $4 a share assessment clearly indicates that the order applied to the $1.50 fund.

The Commission's order of January 4, 1928, referred to the report and made it a part thereof. (R. 163.) A report of the Commission is customarily made a part of its order because, if all partic-

ulars were to be set forth in the order, it would in most cases be unreasonably long and a mere repetition of what had been explained in the report. In *American Express Co.* v. *Caldwell,* 244 U. S. 617, 626–627, this Court, in passing upon the proper construction of an order of the Interstate Commerce Commission, gave weight to statements in the Commission's accompanying report.

Since all stockholders might not pay the assessment provided in the Plan and since the Commission could require the impounding of $4 a share only to the extent that assessments were paid, the Commission limited its order to "the money received" from payment of the stockholders' assessment. The District Court, instead of giving these words their natural meaning, viewed them as applying only to money which was receivable as of right by appellee under the Plan. It is submitted that this interpretation is inconsistent with the court's holding (R. 203) that the Commission's order applied to the $4 a share assessment other than the $1.50 fund, although all of this $2.50 a share balance was not receivable as of right by appellee under the Plan. (R. 26, 65.) The opinion of the District Court expressly recognized that appellee was entitled as of right only to such part of the balance of the stockholders' uncapitalized $4 a share assessment, less the $1.50 fund, as remained after the payment of reorganization expenses. It said (R. 202):

> It was provided in the reorganization plan that all cash paid in by stockholders, other than the trust fund, should be paid to plaintiff, *first deducting, however, expenses of the receivership and foreclosure proceedings and expenses of plaintiff in the reorganization.* The $2.50 per share, *less said deductions,* thus became a part of the cash to be delivered to the plaintiff and used by it as a part of its cash requirements aggregating $70,032,548.00. (Italics ours.)

A further objection to the District Court's interpretation of the order is that it is dependent upon the view that the reference in the order to the payment of "$4 a share" is merely descriptive. There appears to be but slight justification for so regarding it. The Plan did not separately designate any $4 fund or any $4 a share assessment. It provided that common stockholders should pay $32 a share and preferred stockholders $28 a share and should receive, respectively, $28 principal amount in new bonds and a share of new common stock and $24 principal amount in new bonds and a share of new preferred stock. It specified the total amount of the assessment on the stockholders and the part thereof to be capitalized in new bonds and stated that all reorganization expenses would be paid out of the uncapitalized difference. (Subdiv. (e) and (g), Par. IV of Introductory Statement, R. 33.) It was the Commission itself which first used the expression "$4 a share" fund.

The words, therefore, can not be properly characterized as descriptive. If the Commission had not intended to exercise jurisdiction over the $1.50 fund, its order would naturally have referred to the money received from the "$2.50 a share" payment by stockholders, thereby designating the $4 a share uncapitalized assessment, less the $1.50 fund. The Commission, in retaining jurisdiction over "the money received from the payment by holders of preferred and common stock in an amount equal to $4 a share," extended its order to all of the $4 a share payment.

The District Court also expressed the opinion that the receivership court had interpreted the Commission's order as not requiring the impounding of the $1.50 fund. The basis for this conclusion is that a copy of the order of the Commission entered January 4, 1928, was attached to appellee's application to that court for an order directing the execution and delivery of deeds of sale to appellee, that the order of the Commission constituted a modification of the Reorganization Plan, and that appellee and the Managers had no right so to modify the Plan which had been approved by the court without according to all stockholders an opportunity to be heard. But since any modification of the Plan required by the Commission's order was clearly for the benefit of the stockholders, it is reasonable to assume that the receivership court (if it considered the matter at all) did not deem it

necessary to give the stockholders an opportunity to be heard on a modification of the Plan in their favor. It is therefore submitted that the District Court erred in stating that the receivership court had interpreted the Commission's order as not requiring the impounding of the $1.50 fund. There is also nothing to indicate that the question of whether the Commission's order constituted a modification of the Plan was submitted to the receivership court. Under these circumstances its action in directing the delivery of deeds of sale to appellee is entitled to very little weight.

II

THE ORDER OF THE COMMISSION AUTHORIZING THE ISSUE OF APPELLEE'S SECURITIES UPON THE CONDITION THAT APPELLEE IMPOUND THE $1.50 FUND AND PAY OUT THE SAME ONLY ON PROPER ORDER OF THE COMMISSION OR THE COURT WAS VALID

By paragraph (2) of Section 20a of the Interstate Commerce Act (41 Stat. 494) the carrier may issue securities only to the extent that the Commission after investigation "of the purposes and uses of the proposed issue and the proceeds thereof" authorizes such issue. The Commission is to make such order only if it finds that the issue is compatible with the public interest, appropriate for or consistent with the proper performance of the carrier's duty to serve the public as a common carrier, and reasonably necessary and appropriate for such purpose. By paragraph (3) the Commission is given power by its order to grant or deny the applica-

tion as made or to grant it in part or deny it in part, or to grant it with such modifications and upon such terms and conditions "as the Commission may deem necessary or appropriate in the premises," and the Commission may thereafter make such supplemental orders as it may deem necessary or appropriate.

Section 20a was one of the amendments to the Interstate Commerce Act made by the Transportation Act, 1920. The general purposes and objects of the Act of 1920 were stated by this Court in *New England Divisions Case,* 261 U. S. 184, 189, as follows:

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed.

> The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important.

The 1920 amendments to the Commerce Act give recognition to the many factors involved in maintaining an efficient, economical transportation system. Important among these is railroad credit, that is, the ability to finance on favorable terms. It seems proper, therefore, that the Commission, in exercising the broad powers conferred by Section 20a, be concerned that carriers receive the largest possible portion of each dollar contributed by the investing public. Under Section 20a the duty of the Commission may not be fully accomplished when it has found that the general purpose of a proposed security issue is in the public interest and that it would not weaken the carrier's financial structure. We submit that the Commission may also inquire whether the proposed plan of financing is calculated to keep financing charges as low as possible. Thus the Commission has required competitive public bidding for equipment trust certificates, a policy which appears to have brought about a marked reduction in the average spread between the sales price to bankers and their sales price to the public. *Chicago, St. P., M. & O. Ry. Co. Equipment Trust,* 145 I. C. C. 444, 446. Likewise the Commission has, as in this case, prohibited the payment of underwriting commissions. *Stock of N. Y., N. H. & H. R. R.,* 131 I. C. C. 233, 238. In *Control of Erie R.*

R. and Pere Marquette Ry., 138 I. C. C. 517, 535, it said:

> The fact that a corporation engaged in transportation has capitalizable assets in sufficient amount to support an increase in securities does not, in itself, justify such increase * * *. The necessity for the proposed issue must be demonstrated and the terms upon which it is to be sold must be found reasonable.

In the present case appellee proposed to issue certain securities for property and cash. The property was known, but the cash was subject to the payment of reorganization expenses which, except for those subject to approval by the court, might be determined by the Managers. As the case was presented to the Commission, the Managers had it in their power to determine to a material degree the amount of cash which appellee would receive in exchange for the securities that were to be issued. Under these circumstances the Commission was called upon to exercise the plenary powers given it by the Act with respect to the proceeds to be derived from the issue of railroad securities. The Commission determined that it was necessary and appropriate in the premises to reserve to itself jurisdiction over the payment of expenses which directly affected the proceeds to be derived from appellee's securities. The District Court held the Commission's orders valid in so far as applicable to the stockholders' assessment other than the $1.50

fund, but held that the Commission could not protect appellee's contingent interest in whatever remained of the $1.50 fund after deducting the charges payable therefrom. The Government submits that it was not beyond the limits of the Commission's discretion to protect appellee's interest in this fund by subjecting fees and expenses chargeable against it to its own scrutiny and supervision.

But even if appellee's contingent interest in the balance of the $1.50 fund would not be in itself a sufficient basis for the exercise of jurisdiction by the Commission over payments made from this fund, the public interest in preventing unnecessary or improper financing charges justifies the Commission's orders reserving to itself jurisdiction over payments from the $1.50 fund. The Reorganization Plan was a method of refinancing. The reorganization expenses represented the cost of this refinancing. The Plan presented to the stockholders of the old company required them, if they desired to participate, to pay a certain amount per share of common and per share of preferred stock, and they were to receive in exchange certain of appellee's securities. The difference between the net cash payment by the stockholders, taking into account any part of their original payment later returned, and the net amount received by appellee from the total stockholders' payment, after deducting reorganization expenses payable therefrom, represented the cost of the refinancing. This cost

remained the same whether the balance of the $1.50 fund went back to the stockholders or into appellee's treasury. If railroad credit is to be fully protected, the investor in railroad securities should be assured against unreasonable reorganization charges. These charges are equally imposed on the investor whether they are borne by the new company or are paid out of funds which the investor is required to contribute.

If reorganization expenses are properly looked upon as a refinancing charge, was the Commision in this case *pro tanto* deprived of its power to regulate such charge because of the provisions of prior agreements as to the disposition of the $1.50 fund? This may be tested by considering what would be the Commission's authority with respect to an analagous underwriting charge. It would scarcely be contended that, although the Commission could regulate an underwriting charge when payable directly by the carrier, it could not regulate such charge if the carrier had agreed that the subscription price paid by the public for the carriers' securities should go first to the bankers and that they should deduct therefrom their underwriting charge before paying the balance to the carrier. And the need for regulation would be all the more patent if the underwriting charge, instead of being fixed, was to be an amount determined in the discretion of the bankers. It is also submitted that the situation would not be changed if the agreement pro-

vided that part of the money received from the sale of the new securities should be allocated to the payment of the underwriting charge, and that any balance of the allocated sum remaining after payment of the underwriting charge could at the election of the bankers either be returned to the purchasers of the securities or be paid to the issuing carrier.

In the last case supposed, as in all the other cases, the underwriting charge represents the spread between the investor's dollar and the amount received therefrom by the carrier. The greater the spread, the less favorably can the carrier finance. The chief differences between underwriting charges and costs of refinancing in a reorganization are that the latter, although less frequent, are more burdensome and less within the investor's control.

It seems not unlikely that the provisions relating to the $1.50 fund were inserted in the Plan for the very purpose of escaping the Commission's control over the items payable therefrom. If this device can withdraw some of the reorganization expenses from supervision by the public authorities, it can be used to withdraw from such supervision all except those which are subject to court approval. It is not unreasonable to suppose that railroad credit will be strengthened if investors may look to the Interstate Commerce Commission to guard against unreasonable or improper reorganization charges if a railroad goes into receivership.

In the first place, the Commission's action must be viewed from the standpoint not only of the protection given to the stockholders concerned in this particular reorganization, but from the standpoint of a policy generally applicable to reorganizations. In the second place, upon a realistic view of the facts of this case there is no presumption that the stockholders willingly ceded to the Managers unlimited discretion over reorganization expenses. The stockholders were confronted with a Plan which they had to accept or lose their status as stockholders. Under the Reorganization Agreement those who did not become parties "within the periods limited or fixed therefor" could thereafter become parties and share in the benefits of the Plan only upon obtaining an express written consent of the Managers, and the latter were empowered "in their absolute discretion" and "upon such general or special terms and conditions as they may see fit, to withhold or give such consent." (R. 66.) The Circuit Court of Appeals, in affirming the decision of the District Court confirming the sale, finally modified the decree so as to provide that any time limit for the deposit of bonds under the Plan should be approved by the District Court. *Jameson* v. *Guaranty Trust Co.*, 20 F. (2d) 808, 814.

The weight to be given to the approval of the Plan by the original Committees may be judged from the fact that these committees were organized, prior to the receivership, by the bankers who as Managers later formulated the Plan. *Chicago,*

Milwaukee & St. Paul Investigation, 131 I. C. C. 615, 667. The Commission in its unanimous report in that case said (pp. 667–668):

> For months prior to the receivership they [the railroad's directors] were impotent. It was an ideal situation for the bankers to control. This they promptly did, arranged all the details, framed up the committees favorably to themselves, put themselves on the bondholders' protective committee and constituted themselves reorganization managers.

The Commission's report in the above case, issued the same day as its report and order on the reorganization here under consideration, suggests cogent reasons why the public interest might require scrutiny of the expenses and fees which under the Plan the Managers might determine. The Commission stated that these banking houses had taken a banker's profit of over 5% in retiring certain of the old company's bonds when 2% "would have been generous" and that the risk which the bankers stressed in justification of the large profits which they realized was largely nonexistent. *Chicago, Milwaukee & St. Paul Investigation, supra,* pp. 630–631. It said (p. 631):

> The transaction in view of all the circumstances is obviously inconsistent with any theory of the relationship which is supposed to exist between a railroad and its regular bankers. * * * The transaction is de-

> fended on the ground that in it Kuhn, Loeb & Company were not acting as the bankers for the St. Paul. That is exactly the point. They had acted as bankers for the St. Paul as far back as 1880; since 1909 they and the National City Bank had exclusively handled vast sums for the St. Paul; and yet at this opportunity to render to the St. Paul an important banking service the banker-railroad relation was suspended and profits greater than regular banking compensation were received.

Certain parts of the opinion of the District Court seem to suggest that it considered that the Commission exhausted its statutory power in this case when it found that appellee would receive an unmortgaged equity sufficient to support the proposed issue of common stock and when it determined that, although appellee's proposed financial structure was far from satisfactory, the major public interest required approval of the reorganization in its general outline. But that court's holding that the Commission's order was valid as applied to the part of the stockholders' assessment not represented by the $1.50 fund, shows that it conceived that this was not the full extent of the Commission's power under Section 20a. Certainly the narrower view of the Commission's authority is contrary to the practice of the Commission in exercising control over financing terms without regard to the fact that the carrier's assets may be sufficient to support the proposed security issue (pp. 27–28, *supra*).

Appellee contended in the District Court that the Commission's order was invalid because it attempted to nullify the contract rights of those who were not parties to the proceeding. But all of the agreements out of which the alleged contract rights arose were subject to the Commission's approval of the issue of appellee's securities. The Commission by its order did not remake, or attempt to remake, any contracts. It said that appellee could issue its securities only if it received as consideration therefor, in addition to the property and cash which it was to receive under the Plan, custody of the full amount of the assessment on the stockholders. If this order was valid, appellee could legally offer its securities only on these terms. The Managers or security holders, if they had considered the Commission's order a vital modification in the Plan, might have refused to accept the securities. When they accepted the securities issued pursuant to the Commission's order they must be deemed to have waived any inconsistent provisions of the prior agreements.

Appellee also attacked the Commission's order in the District Court on the ground that it in effect took away the right to a judicial determination of claims for services rendered in the reorganization. It is submitted that the order had no such effect and that, reasonably construed, it prevents only *voluntary* payment of reorganization expenses in excess of amounts approved by the Commission

or court. Any claimant dissatisfied with the decision of the Commission still has his day in court and he has the same legal remedies that he would have had if the Commission had not taken jurisdiction over payment of reorganization expenses. If a judgment is recovered against the Managers for any liability not covered by the $1.50 fund, they are protected by the indemnity provisions of the contract of April 11, 1927. (R. 99.) If a judgment is recovered against the Managers for a liability covered by the $1.50 fund, their right to charge the $1.50 fund with this judgment seems clear. The Commission's order did not purport to transfer ownership in the fund, but merely its custody. The order, in stating the terms upon which appellee might pay reorganization expenses, including those which under the Plan were chargeable against the $1.50 fund, recognized that the $1.50 fund was still charged with payment of the same items which were chargeable against it under the Plan. The Commission's order merely provided that, except on a valid judgment, such items should not be paid until approved by the Commission or the court. In any event the order should not be set aside on a construction which the Commission has not asserted and which might render its validity doubtful. The courts will reject an interpretation of a statute or written instrument which will destroy it where another interpretation not having that effect is possible. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408; *Hobbs* v. *McLean*, 117 U. S. 567, 576.

III

THE COURTS HAVE NO JURISDICTION OF A SUIT BROUGHT TO SET ASIDE A CONDITION ATTACHED TO AN ORDER OF THE COMMISSION AFTER THE AUTHORITY GRANTED BY THE ORDER HAS BEEN EXERCISED

The Commerce Court Act (c. 309, 36 Stat. 539) conferred upon the Commerce Court jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act (c. 32, 38 Stat. 219) transferred the jurisdiction of the Commerce Court to the several District Courts of the United States.

The Government submits that the authority to enjoin a Commission order "in part" applies to a severable part of an order but not to a condition upon which an order was issued after the carrier has exercised the authority granted by the order. If the condition is attacked *in limine,* then the courts might have jurisdiction because, if the condition is found void, the case may be remitted to the Commission for further proceedings. But if the courts set aside a condition to an order of the Commission after the authority granted has been exercised, they thereby substitute their judgment for that of the Commission upon an administrative question the determination of which Congress vested in the Commission. *Procter & Gamble* v. *United States,* 225 U. S. 282, held that the courts have no jurisdiction to set aside a negative order of the Commission on the ground, among other

grounds, that the legislative history of the Interstate Commerce Act showed that Congress intended the Commission to act before the courts took jurisdiction.

If the courts set aside a condition attached to an order of the Commission, leaving the order outstanding without the condition, the courts are deciding a different administrative question from the one passed upon by the Commission. The results which the Commission sought to accomplish by its condition might have been considered so essential or the balance of the public interest in favor of an affirmative order might have been deemed so slight that the Commission, if it had been advised that the condition was beyond its powers, would not have issued any order or would have issued a different kind of order. The question presented with those considerations represented by the Commission's condition eliminated is not the same as the question presented with these considerations factors in the decision.

In the present case the Commission's report shows that it was far from satisfied with the terms of the proposed reorganization and that, after weighing the conflicting public interests, it granted its approval reluctantly. (*Supra,* p. 10.) Four commissioners believed that appellee's application should be denied. (R. 143, 155.) The Commission evidently considered that the conditions attached to its order would rectify in the public interest

certain features of the proposed plan for the issue of appellee's securities. The record falls short of showing that the Commission would have authorized such issue if it had known that its approval would involve leaving in the Managers full freedom with respect to the $1.50 fund. It is submitted that without such a showing this Court and the District Court have no jurisdiction and the defendants' motion to dismiss should be sustained.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be reversed with directions to dismiss the petition either on the merits or for want of jurisdiction.

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